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Before the

**FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

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In Re Applications of )  
TRINITY BROADCASTING OF FLORIDA, )  
INC. )  
For Renewal of License of )  
Television Station WHFT(TV) )  
Miami, Florida )  
GLENDALE BROADCASTING COMPANY )  
For Construction Permit )  
Miami, Florida )

MM Docket No. 93-75  
DIRECTOR OF SECRETARY

BRCT-911001LY

BPCT-911227KE

To: Hon. Joseph Chachkin  
Administrative Law Judge

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**VOLUME III**

**PROPOSED CONCLUSIONS OF LAW**

(Pages 390 - 544)

TRINITY BROADCASTING OF FLORIDA, INC.,  
TRINITY BROADCASTING NETWORK,  
NATIONAL MINORITY T.V., INC.

Mullin, Rhyne, Emmons and Topel, P.C.  
1225 Connecticut Ave., N.W.--Suite 300  
Washington, D.C. 20036-2604  
(202) 659-4700

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### **III. PROPOSED CONCLUSIONS OF LAW**

#### **A. Trinity Qualifications Issues**

##### **1. Applicable Minority Ownership Policies**

590. The de facto control and abuse of process issues that have been designated against Dr. Crouch, TBN, and TBN's affiliates arise in the context of the Commission's policies to promote minority ownership in broadcasting, and concern the manner in which Dr. Crouch, TBN, and TBN's affiliates applied those policies. Accordingly, to resolve these issues, it first is necessary to review the applicable policies.

591. Since 1978, the Commission has pursued formal policies to increase the number of minority owned broadcast stations, which has been disproportionately low compared to the minority population. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 981 (1978) (Commission adopts tax certificate and distress sale policies to address "a dearth of minority ownership in the broadcast industry"). In pursuing those policies, the Commission has identified two major obstacles to increasing minority ownership, the lack of financing and the lack of management and technical expertise. Strategies for Advancing Minority Ownership Opportunities in Telecommunications, The Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications to the Federal Communications Commission (May

1982) ("1982 Advisory Committee Report"). The Commission has called the lack of available financing to capitalize telecommunications ventures "the pressing dilemma" and the "greatest obstacle" to minority ownership. Statement of Policy on Minority Ownership of Broadcast Facilities, 92 FCC 2d 849, 853, 856 (1982) ("1982 Minority Policy Statement"). The Commission also has recognized that minority owned businesses "in particular" have had difficulty acquiring sufficient "expertise" and have "limited broadcast business experience" in order to become successful station owners, and has recently proposed an "incubator" program designed to provide such assistance. Revision of Radio Rules and Policies, 7 FCC Rcd 6387, 6391 (1992).<sup>86/</sup>

592. Of particular relevance to the issues in this case, the Commission specifically sought to address both of these obstacles to minority ownership when it amended its multiple ownership rules in 1985 to permit group owners to hold cognizable interests in two additional stations that are minority con-

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<sup>86/</sup> These concerns have continued to the present time. In fact, relying again on the findings of the 1982 Advisory Committee Report, the Commission only last month reiterated that "the shortage of capital" and the lack of experience are the principal barriers facing minorities seeking ownership opportunities in telecommunications. Implementation of Section 309(j) of the Communications Act, FCC 94-178, released July 15, 1994, at ¶¶105-107. See also Statement of Reed E. Hundt, Chairman, Federal Communications Commission, before the United States House of Representatives Committee on Small Business Subcommittee on Minority Enterprise, Finance, and Urban Development, FCC News Release, May 20, 1994) (calling the lack of access to capital "the single greatest obstacle to entry by minorities" and noting that "minorities frequently are denied access to traditional sources of financing and generally have to rely on family savings or friends").

trolled. Reconsideration of Multiple Ownership Rules, 100 FCC 2d 74, 94 (1985); HDO ¶16. The origin of that action was the 1982 Advisory Committee Report, supra, which was prepared by the Commission's specially created Advisory Committee "for the purpose of exploring means to facilitate minority ownership of telecommunications properties." 1982 Minority Policy Statement, supra, 92 FCC 2d at 852.<sup>87/</sup> In that Report, the Advisory Committee focused on the lack of financing and the lack of management and technical expertise as the two primary impediments to minority ownership. In this regard, the Report stated:

"Minority participation is even smaller when viewing the telecommunications industry as a whole. Chief among the reasons for the low minority participation rate is the lack of adequate access to capital and a lack of management and technical expertise." 1982 Advisory Committee Report, p. 19 (emphasis added).

The Report also was explicit about the kind of management and technical expertise that minorities required -- "engineering, law, accounting, finance, public relations." Id., p. 18.

593. To address these reasons for the low minority participation rate, the Advisory Committee expressed the need for "[m]ore extensive follow-through assistance from the entry stage to an appreciable period of the business operation," and stressed the importance of providing such assistance through

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<sup>87/</sup> The Advisory Committee was created in September 1981 under the Chairmanship of Commissioner Henry M. Rivera, and was comprised of leaders in the financial, telecommunications, private, and public sectors. Id., n. 15. The Committee members are individually listed at 52 RR 2d 1301, 1315-16 (1982).

"joint ventures" between minorities and "private sector resources that can provide management/technical assistance specializing in telecommunications." 1982 Advisory Committee Report, pp. 21-23. The Committee also declared that such "joint venturing" could be "a vehicle for directly financing a minority buyer." Id., p. 31. Based on the foregoing considerations, the Committee urged the Commission to change the multiple ownership rules to "involve the grant of waivers or expansion of multiple ownership and diversification requirements to established entrepreneurs who participate in telecommunications ventures with minorities." Id., p. 32. The Committee encapsulated its considerations in the following specific recommendation that it made to the Commission:

"Recommendation: For example, FCC policies should allow an established entrepreneur to acquire an equity interest in a minority-controlled property that otherwise would exceed multiple ownership limits or adversely affect diversification. The policy could encourage participation in varying degrees, from a simple equity position by a venture capitalist with no management activity, to a situation where minorities hold a controlling interest while the established operator develops the property. The latter venture enables the investor to protect his return on equity and provides an inexperienced minority entrepreneur with management and technical support. Another possibility would be to allow the established multiple operator to acquire the additional prohibited property provided he assisted a minority in the financing of another com-

parable venture." Id. (emphasis added).

594. The Commission considered the recommendations of the 1982 Advisory Committee Report in the 1982 Minority Policy Statement, supra. 92 FCC 2d at 852. At that time, the Commission acknowledged that the Advisory Committee had recommended that the multiple ownership rules be amended to permit "joint venturing" between established broadcasters and minorities in order to provide "managerial and technical expertise" and additional financing from experienced broadcasters to minorities. Id. at ¶(6) and n. 17. However, rather than address that recommendation in the context of its 1982 policy statement, the Commission specifically determined to consider it in the context of its revisions of the multiple ownership rules. As the Commission stated,

"We believe it is appropriate to defer immediate consideration of items (5) and (6) above, the Advisory Committee's recommended amendments to our multiple ownership rules. We are in the process of undertaking a comprehensive review of those rules, and we believe it is more productive at this point to consider any minority ownership implications of these rules in the context of our overall review." 92 FCC 2d at 853.

595. The Commission did consider the proposal to expand the multiple ownership limits to create an incentive for established broadcasters to participate in communications ventures with minorities when it acted on its overall review of the multiple ownership rules, and it adopted the proposal. Reconsideration of Multiple Ownership Rules, supra. As a

result, the recommendation of the 1982 Advisory Committee Report became the Commission's policy.

596. The specific amendment that the Commission adopted to expand the multiple ownership limits to encourage established broadcasters to assist minorities provides as follows:

"(d)(1) No license for a commercial AM, FM or TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in, either:

(A) More than fourteen (14) stations in the same service, or

(B) More than twelve (12) stations in the same service which are not minority-controlled....

(3) For purposes of this paragraph: ...

(C) "minority-controlled" means more than 50 percent owned by one or more members of a minority group." Reconsideration of Multiple Ownership Rules, supra, 100 FCC 2d at 99-100 (emphasis added).

597. In permitting established broadcasters to hold a cognizable interest in two additional stations that are more than 50 percent minority owned, the Commission clearly contemplated that the experienced broadcaster would provide the capital financing and management expertise that were needed to promote minority ownership. Indeed, that was the whole purpose. Only a short time earlier, while the Advisory Committee recommendation to expand the multiple ownership limits to assist minority ownership was still being considered, the Commission

adopted its Report and Order in Attribution of Ownership Interests, 97 FCC 2d 997 (1984), and specifically confirmed that cognizable interests include active managerial roles as officers and Directors. In particular, the Commission consolidated its multiple ownership rules into a new Section 73.3555 and included in pertinent part the following language:

"NOTE 2: In applying the provisions of this section, ownership and other interests in broadcast licensees, cable television systems and daily newspapers will be attributed to their holders and deemed cognizable pursuant to the following criteria: ...

(h) Officers and directors of a broadcast licensee, cable television system or daily newspaper are considered to have a cognizable interest in the entity with which they are so associated." 97 FCC 2d at 1050-51; Section 73.3555 of the Commission's Rules, NOTE 2(h).

598. In the text of its Order, the Commission affirmed that its "basic rationale for attributing interests to officers or directors of corporate licensees or those of the licensee's parent corporations remains valid" -- namely, "the potential influence over a licensee wielded by these individuals is significant and should be cognizable if the purposes of our multiple ownership rules are to be properly vindicated." 97 FCC 2d at 1025. The Commission continued that the particular concern behind its determination that officers and Directors hold cognizable interests involves "officers and directors with 'media expertise.'" Id. The Commission explained the reason for that concern as follows:

"It is, however, precisely the ability of an officer or director, particularly one with 'media expertise,'



to influence multiple licensees that our ownership rules are intended to detect and limit, and properly so." Id.

599. In authorizing an experienced broadcaster to hold a cognizable interest as an officer and/or Director under the minority ownership provision of Section 73.3555, the Commission thus clearly contemplated that the experienced broadcaster would employ its media expertise to provide significant influence to the licensee's activities. That intention, of course, is exactly consistent with the two primary goals the Commission sought to accomplish as set forth in the Advisory Committee's recommendation. (§593 above.) First, the Commission sought to encourage established operators to provide capital investment by enabling them to develop the property and protect their investment through active participation as influential officers and/or members of the governing Board. Id. Second, by encouraging such activities and influence by experienced broadcasters, the Commission sought to provide vital management and technical support to minorities. Id.<sup>88/</sup>

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<sup>88/</sup> In his Separate Statement Dissenting In Part from the Commission's revisions of the multiple ownership rules, Commissioner Patrick stated that the Commission's action contemplated such extensive involvement by the experienced broadcaster that "No concern is given as to whether the 51% minority owners will exert any influence on the station's programming or will have any control at all." Reconsideration of Multiple Ownership Rules, supra, 100 FCC 2d at 104. This statement similarly illustrates that the Commission majority clearly contemplated that the experienced broadcaster holding the additional cognizable interest would have extensive involvement and influence in the licensee's activities.

600. In short, in expanding the multiple ownership limits to increase minority ownership, the Commission adopted a policy that encouraged experienced broadcasters to enter into joint ventures with minorities through which experienced broadcasters would provide capital financing; develop the property; provide management and technical expertise and assistance in such needed areas as engineering, law, accounting, finance, and public relations; exercise significant influence through cognizable interests as officers and Board members; and maintain this assistance "from the entry stage to an appreciable period of the business operation." (§§592-99 above.) At no time has the Commission ever held that the promotion of minority ownership in general, and this policy in particular, apply only to for-profit commercial entities and do not apply to nonprofit religious broadcasters. Indeed, the Commission specifically confirmed that the policy embodied in the minority ownership expansion of the multiple ownership rules applies to nonprofit religious broadcasters when, after requesting and reviewing NMTV's Articles of Incorporation which show the nonprofit religious nature of the company (§30 above; TBF Ex. 101, Tab I, p. 3), it processed and granted NMTV's Odessa and Portland applications under that policy. Accordingly, in considering the de facto control and abuse of process issues that have been designated, the fundamental question is whether Dr. Crouch, TBN, or TBN affiliates knowingly and deliberately exceeded the underlying policies on which the minority expansion of the multiple

ownership rules is based so as to mandate disqualification and loss of license. As shown below, the answer to that question is no.

## **2. De Facto Control Issue**

601. This issue is directed to the question of whether Dr. Crouch, TBN, or TBN's affiliates exercised de facto control over NMTV. As the HDO indicates, the issue arises under Section 310(d) of the Communications Act. HDO ¶52. Section 310(d) states in pertinent part:

"(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."

Thus, the issue presented is whether Dr. Crouch, TBN, or TBN's affiliates exercised de facto control over NMTV after NMTV became the holder of a construction permit or station license. The first Commission authorization that was issued to NMTV was the assignment of the Odessa construction permit, which was granted on June 9, 1987. (¶30 above.)

602. The HDO raised four considerations regarding the de facto control issue. Three of those considerations are the control of programming, personnel, and finances, which are the typical focus of a de facto control inquiry. HDO ¶17, citing

News International, PLC, 97 FCC 2d 349, 357-8 (1984). The fourth consideration is alleged control by TBN over NMTV's Board of Directors, which the HDO included for evaluation based primarily on the facts that two of NMTV's Directors, Dr. Crouch and Mrs. Duff, have been high ranking TBN employees and Dr. Crouch has been the President of both companies. HDO ¶33.

603. In the evaluation of de facto control questions, the law is clear "that influence and control are not the same." News International, PLC, supra, 97 FCC 2d at 356; Telephone and Data Systems, Inc. v. FCC, 19 F.3d 655, 657 (D.C. Cir. 1994). That distinction is significant because, as set forth above, Commission policy not only permits Dr. Crouch and TBN as experienced broadcasters to have substantial influence in NMTV, it affirmatively encourages it. (¶¶590-600 above). Under Commission policy, whether permitted influence crosses the line to become impermissible control depends on whether a new entity or individual acquires the right to determine the basic policies concerning the operation of the station. Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981), citing, WHDH, Inc., 17 FCC 2d 856 (1969), aff'd, sub nom. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

604. These conclusions concerning the de facto control issue are divided into three parts. The first part addresses the question of whether a violation of Section 310(d) has

occurred applying current precedents to the considerations raised in the HDO, and shows that no such violation has occurred. The second part demonstrates that, even assuming a violation has occurred, current Commission standards would not warrant disqualification or the imposition of any significant penalty. The third part identifies the profound statutory and constitutional violations that result when the government seeks to impose penalties and restrict the exercise of rights and privileges based on individual elections concerning speech, religion, association, and the governance of religious organizations, and shows that application of the amorphous de facto control policies to impose a penalty in this case would be unlawful. Since the analysis based on current Commission and statutory standards reveals that no violation has occurred and no penalty is warranted in any event, under settled judicial principles it is not necessary to reach the constitutional issues in order to resolve this case. Harmon v. Brucker, 355 U.S. 579, 581 (1958) (court reaches constitutional issues only when essential to disposition of a case). Nevertheless, in the interest of furnishing a complete treatment of the important matters presented by this proceeding, a discussion of those issues is included in these conclusions.

**a. No Violation of Section 310(d) Has Occurred**

**(1) Programming**

605. Under the established case law, no de facto control over NMTV's programming has occurred. See, e.g., The Seven Hills Television Company, Inc., 2 FCC Rcd 6867, 6882 (Rev. Bd. 1987); The O.T.R.H., Inc., FCC 871-097, released September 8, 1987; Spanish International Television Co., Inc., 5 RR 2d 3, 6, 7 (1965); J. Dominic Monahan, Esquire, 6 FCC Rcd 1867 (MMB 1991). Each of NMTV's Directors has expressed his or her individual preference that NMTV's stations broadcast TBN programming. (¶176 above.) It is their right to hold that preference, and no adverse conclusion of control by others can properly be drawn to deny a license based on the personal convictions that they hold.<sup>89/</sup> Moreover, the affiliation agreements between NMTV and TBN provide that NMTV retains the rights to reject or refuse to broadcast programs and to substitute public interest programming as it deems appropriate. (¶178 above.) Either party, including NMTV, has the right to termi-

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<sup>89/</sup> See, e.g., Branti v. Finkel, 445 U.S. 507, 514-15 (1980) (the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interest in freedom of speech); Perry v. Sindermann, 408 U.S. 593, 597 (1972) (to the same effect); Regan v. Taxation With Representation, 461 U.S. 540, 545 (1983) ("the government may not deny a benefit to a person because he exercises a constitutional right"). See also Spanish International Television Co., supra, 5 RR 2d at 7 (programming proposal is a result of a valid exercise of the applicant's judgment). The constitutional implications of the issues in this proceeding are discussed more fully in ¶¶673-80 below.

nate the agreement with notice. (§179 above.) These provisions place the affiliation arrangements well within the permitted guidelines concerning de facto control.

606. The law is well established that such network affiliation arrangements do not constitute de facto control. For example, in The Seven Hills Television Company, supra, the Review Board held that the licensee's heavy reliance on network programming, even when coupled with the network's provision of substantial and extremely favorable financing, did not constitute de facto control. 2 FCC Rcd at 6882.<sup>90/</sup> Similarly, as the Board in Seven Hills recognized (2 FCC Rcd at 6880, 6882), the Commission in The O.T.R.H., Inc., supra, found no question of de facto control raised by the provision of network programming, even when the network also provided substantial financing, held a security interest in the licensee's stock, and held an option to acquire the licensee's stock.<sup>91/</sup> In Spanish International Television Co., supra, the Commission held that

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<sup>90/</sup> Although The Seven Hills Television Company arose under the provisions of Section 310 that concerned alien control, the Review Board made clear that "the tests for de facto control under 47 U.S.C. §310 are identical for both alien and domestic principals," and applied a traditional de facto control analysis to the issues involved. 2 FCC Rcd at 6877, 6880. In vacating two unrelated paragraphs of the Review Board's decision as having subsequently become moot, the Commission confirmed that the Board determined that an actual violation of Section 310 had not been demonstrated. The Seven Hills Television Company, 4 FCC Rcd 4062, 4063 (1989).

<sup>91/</sup> The Commission reached the same conclusion and approved similar programming, financing, and option provisions in David A. Davila, 5 FCC Rcd 5222 (Video Services 1990), aff'd 6 FCC Rcd 2897 (1991).

improper control under Section 310 did not exist where the network that was alleged to exercise such control would provide the bulk of the licensee's programming. 5 RR 2d at 6, 7. In J. Dominic Monahan, ¶605 supra, the Commission held that a programming affiliation agreement that called for the licensee to receive programming from another party from 6 a.m. to midnight seven days a week for seven years did not violate Section 310 where the agreement contained provisions by which the licensee retained the rights to delete or reject programming and to substitute public interest programming as it deemed appropriate, and to terminate the agreement with notice.

607. Moreover, the Commission has held that these standards apply even when the agreement provides that the licensee's station may be programmed up to 24 hours a day, seven days a week, by the non-licensee program source. Brian M. Madden, Esquire, 6 FCC Rcd 1871 (MMB 1991) (agreement by which licensee makes available its facilities 24 hours per day, seven days a week, for the programming provided by another party raises no question of undue control where the licensee retains the rights to suspend or cancel programming and to preempt programming to substitute programs of greater interest); Peter D. O'Connell, Esquire, 6 FCC Rcd 1869 (MMB 1991) (licensee's agreement for the provision of 24 hours daily of program time to another party involves no abdication of control where similar contractual provisions are included); Ms. Gisela Huberman, Esq., DA 91-1158 (MMB released September 19, 1991) (to the same effect); Joseph



A. Belisle, Esq., 5 FCC Rcd 7585 (MMB 1990) (network affiliation agreement allowing for up to 24 hours per day of programming approved "regardless of the number of hours of programming [the licensee] chooses to accept"). Accordingly, the network affiliation arrangement between NMTV and TBN does not violate Section 310(d).

608. The record also answers the concern expressed in the HDO regarding the amount of programming that NMTV produces. HDO ¶34. Initially, the fact that a licensee does or does not produce a certain amount of programming says nothing about who made that decision. Indeed, as the cases set forth in ¶607 above demonstrate, it is entirely permissible under Commission policy for a licensee to rely on an outside program source for all of its programming, 24 hours a day, seven days a week. See also Revision of Programming and Commercialization Policies for Commercial Television Stations, 98 FCC 2d 1076, 1089 (1984) (subsequent history omitted), in which the Commission eliminated its guidelines for the broadcast of specified amounts of particular program types, including locally produced programs, citing the potential First Amendment concerns that arise from such regulation of program content.<sup>92/</sup> Thus, to base a decision on the amount of programming NMTV produces would be a legal

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<sup>92/</sup> Independent UHF stations such as NMTV's stations were already exempted from the guideline calling for the broadcast of a specified amount of locally produced programs. Amendment to Section 0.281 of the Commission's Rules, 59 FCC 2d 491, 492, 493 (1976).